STATE OF NEW YORK COUNTY OF MONROE
CITY COURT CITY OF ROCHESTER

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

NIKKI G. CRAFT,
KATHLEEN F. REILLY,
RAMONA SANTORELLI,
MARY LOU SCHLOSS,
DEBORA A. SEYMOUR,
ELISE JO TOOLEY,
LYNN E. ZICARI,

Defendants.

AMENDED MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The defendants submit this Amended Memorandum of Law in support of their motion to dismiss the informations charging them with having violated section 245.01 of the Penal Law. The defendants contend that the informations are defective within the meaning of section 170.35 of the Criminal Procedure Law, and are seeking an order pursuant to section 170.30(1)(a) of the Criminal Procedure Law dismissing the informations. Specifically, the defendants contend that section 245.01 of the Penal Law is unconstitutional in that it violates the defendants' right to equal protection of the laws under the state and federal constitutions; it violates the defendants' right to freedom of speech and expression under the state and federal constitutions; it is void for vagueness in violation of the defendants' right to due process of law and freedom of expression under the state and federal constitutions; and it violates the defendants' fundamental rights under the ninth amendment to the United States Constitution.

This Amended Memorandum of Law provides support for each of the federal and state constitutional challenges raised in the motion to dismiss. It is submitted on behalf of all seven defendants by Lawrence L. Kasperek, Esq. and Daniel DeLaus, Legal Intern, of the Monroe County Public Defender's Office, which is representing defendant Ramona Santorelli; and by David R. Moss, Esq., who is representing defendants Nikki Craft, Kathleen Reilly, Debora Seymour, Elise Tooley, and Lynn Zicari. Each of the defendants

joins in the legal memoranda submitted by Mary Lou Schloss, which are intended to be incorporated herein.

STATEMENT OF FACTS

On June 21, 1986, defendants Nikki Craft, Kathleen Reilly, Ramona Santorelli, Mary Lou Schloss, Debora Seymour, Elise Tooley, and Lynn Zicari participated in a demonstration in Cobbs Hill Park, a public park within the City of Rochester, at which a number of women removed their shirts to protest sexist and repressive laws which permit men, but not women, to go topfree in public places. Each of the defendants was arrested and charged with violating section 245.01 of the New York State Penal Law, which threatens a woman with criminal sanctions for revealing her breasts below the top of the areola in a public place.

The defendants were arraigned before the Honorable Herman J. Walz on June 23, 1986. On July 8, 1986, the defendants filed pretrial motions for dismissal, raising numerous constitutional objections to the validity of section 245.01 of the Penal Law. Judge Walz reserved decision on the defendants' motions, and the matter was tried before Judge Walz from September 15 to September 18, 1986.

At trial, the defendants testified that their demonstration in Cobbs Hill Park was intended to be an act of civil disobedience, designed as much to challenge and change public attitudes towards the female body as it was to challenge the constitutionality of section 245.01 of the Penal Law. The defendants employed various

methods calculated to educate supporters, spectators and the community at-large concerning the meaning of their protest: the defendants distributed literature describing their views on the subject of topfree equality, including articles entitled "OK, Men, Cover Your Chests -- Or Let Women Sunbathers Go Topless, Too," and "Keep Your Shirt On, Girlie -- Not One More Hot Summer Day, Not Unless It's OUR Choice." The defendants enlisted the help of supporters to chant, "Not the Church, Not the State, Women Will Decide Our Fate." The defendants displayed signs expressing slogans such as "Keep Your Laws Off Our Bodies" and "The Struggle for Women's Rights Continues in the Hometown of Susan B."; one of the defendants had several male friends display a banner stating, "I Support Equal Rights for My Sisters." The defendants distributed a press release to the media several days before the demonstration in order to educate those who influence public attitudes in our community; and the defendants spoke with numerous reporters from television stations, radio stations and newspapers across the nation.

Police officers who were present in Cobbs Hill Park on June 21, 1986, testified that the demonstration was peaceful and orderly. None of the defendants engaged in conduct which could be described as sexually suggestive, sexually provocative, lewd or obscene. Moreover, the demonstration took place in a relatively secluded part of Cobbs Hill Park; according to the testimony of one officer, the protesters were not visible from and did not interfere with the use or enjoyment of the numerous recreational

facilities in the park.

I.
SECTION 245.01 OF THE PENAL LAW VIOLATES DEFENDANTS' RIGHT TO EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 11 OF THE NEW YORK STATE CONSTITUTION

The defendants in this case have been charged with violating section 245.01 of the New York State Penal Law, which provides that:

> A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

It is the contention of the defendants that section 245.01 of the Penal Law is unconstitutional and invalid in that it violates their right to equal protection of the laws under the fourteenth amendment to the United States Constitution and Article I, Section 11 of the New York State Constitution. The fourteenth amendment to the United States Constitution provides in pertinent part that: "No State shall . . . deny any person within its jurisdiction the equal protection of the laws." Article I, Section 11 of the New York State Constitution provides in pertinent part that: "No person shall be denied the equal protection of the laws of this State or any subdivision thereof."

Section 245.01 of the Penal Law permits men to go topfree in public places, but forbids a similar freedom for women. Men are

permitted to remove their shirts at the beach, in public parks, and on the public streets; women are threatened with criminal prosecution for engaging in an identical form of conduct. This arbitrary, systematic course of discrimination constitutes a denial of equal protection by favoring the actions of one class, males, over those of another, females.

The United States Supreme Court has repeatedly held that statutes containing gender-based classifications cannot withstand scrutiny under the fourteenth amendment's equal protection clause unless the gender-based classification is "substantially related to the achievement of an important governmental objective." Craig v. Boren, 429 U.S. 190, 197 (1976). See also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 459 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980); Califano v. Westcott, 443 U.S. 76, 85 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Webster, 430 U.S. 313, 316-17 (1977); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977). This analysis applies whether the classification discriminates against males or against females. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. at 723; Caban v. Mohammed, 441 U.S. at 394; Orr v. Orr, 440 U.S. at 278-79; Craig v. Boren, 429 U.S. at 204.

The Supreme Court has further held that the government bears the burden of demonstrating the importance of its asserted objective, as well as the burden of proving the existence of a

substantial relationship between the gender-discriminatory classification and achievement of the governmental objective. See, e.g., Kirchberg v. Feenstra, 450 U.S. at 461; Wengler v. Druggists Mut. Ins. Co., 446 U.S. at 151-52; Caban v. Mohammed, 441 U.S. at 393; Craig v. Boren, 429 U.S. at 204. To meet this constitutionally-mandated burden of proof, the government must set forth an "exceedingly persuasive justification" for the challenged classification, Mississippi Univ. for Women v. Hogan, 458 U.S. at 724; Kirchberg v. Feenstra, 450 U.S. at 461, and must demonstrate that the gender-based statute promotes the asserted governmental objective better than would a gender-neutral law. See, e.g., Wengler v. Druggists Mut. Ins. Co., 446 U.S. at 151-52; Orr v. Orr, 440 U.S. at 281, 283.

Under the Supreme Court's decisions, the governmental objective advanced in support of a gender-based classification must not only be important, but must be legitimate as well. As the Court stated in Mississippi Univ. for Women v. Hogan, 458 U.S. at 724-25:

> [T]he test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

See also Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (plurality opinion).

The New York State Court of Appeals has consistently recognized and applied the above Supreme Court standards in cases involving equal protection challenges under the federal and state constitutions. For example, in People v. Liberta, 64 N.Y.2d 152 (1984), the court sustained an equal protection challenge to New York's rape statute, section 130.35 of the Penal Law, which by its terms proscribed the forcible rape of females by males, but not the forcible rape of males by females. Referring to and elaborating upon the line of Supreme Court precedent discussed above, the Court of Appeals rejected all three arguments advanced by the state in support of the gender-discriminatory statute.

The state first claimed that because only females can become pregnant, the government may constitutionally differentiate between forcible rapes of females and forcible rapes of males. The court rejected this argument, stating that "[t]here is no evidence . . . that preventing pregnancies is a primary purpose of the statute prohibiting forcible rape, nor does such a purpose seem likely." 64 N.Y. 2d at 169. A gender-based classification may not be upheld upon the mere assertion that it is supported by a hypothetical governmental interest; the state must present hard evidence that the asserted objective is in fact a primary purpose behind the statute.

The state next claimed that the gender-discriminatory statute was justified because a female rape victim "faces the probability of medical, sociological, and psychological problems unique to her gender." 64 N.Y.2d at 169. The court flatly rejected this

argument, stating that "[A]n '"archaic and overbroad" generalization' . . . which is evidently grounded in long-standing stereotypical notions of the differences between the sexes, simply cannot serve as a legitimate rationale for a penal provision that is addressed only to adult males." Id. at 169 (citations omitted).

Finally, the state argued that a gender-neutral law for forcible rape was unnecessary because forcible rapes by women against men are extremely rare. While acknowledging that forcible sexual assaults by females upon males are undoubtedly less common than those by males upon females, the court held that "this numerical disparity cannot by itself make the gender discrimination constitutional. . . . A gender-neutral law would indisputably better serve, even if only marginally, the objective of deterring and punishing forcible sexual assaults." 64 N.Y.2d at 170.

The state must satisfy an onerous four-part burden if it is to overcome the equal protection challenge in this case. For the state bears the burden of articulation, i.e. the state must articulate a governmental interest in support of the gender-based classification which is not only non-hypothetical, but also "legitimate" and "important" from a constitutional perspective. Mississippi Univ. for Women v. Hogan, 458 U.S. at 724-25; People v. Liberta, 64 N.Y.2d at 168-69. The state bears the burden of justification, i.e. the state must show that the gender-based statute is justified because there is a "substantial

relationship" between adoption of the gender-based classification and achievement of the state's asserted objective. Craig v. Boren, 429 U.S. at 197; People v. Liberta, 64 N.Y.2d at 168. The state bears the burden of substantiation, i.e. the state must substantiate its claim that the gender-based statute is justified by demonstrating that a gender-neutral statute would be a less effective means of advancing the asserted governmental objective. Wengler v. Druggists Mut. Ins. Co., 446 U.S. at 151-52; People v. Liberta, 64 N.Y.2d at 170. And the state bears the "burden of proof," i.e. the state must present an "exceedingly persuasive justification" for the gender-based statute. Kirchberg v. Feenstra, 450 U.S. at 461; People v. Liberta, 64 N.Y.2d at 168. No presumption of constitutionality applies to gender-discriminatory statutes; in order to overcome the equal protection challenge in this case, the state must come forward with evidence to prove that section 245.01's gender-based provisions are necessary and compelled.

There can be no doubt that section 245.01 of the Penal Law contains a gender-based classification. The statute explicitly states that "the private or intimate parts of a female shall include that portion of the breast which is below the top of the areola." (Emphasis added.) In defense of the statute, the state suggests that section 245.01's provisions merely reflect current community standards in defining the "private" or "intimate" parts of a person's body; the state further suggests that the section's gender-based classification prevents the possibility of indecent

conduct, public disturbance and inconvenience. Answering Affirmation of Assistant District Attorney Thomas J. Brilbeck, p 3-4. None of these alleged governmental interests are sufficient to satisfy the rigorous constitutional standards applicable to gender-discriminatory statutes.

Assuming, arguendo, that section 245.01 of the Penal Law reflects current community standards regarding the definition of "private" or "intimate" parts of the human body, what governmental interest is served by giving this definition the force of law? The state might be taken to suggest that the preservation and promotion of community standards regarding designation of the female breast as "private" or "intimate" is an important governmental objective in and of itself. That is, the state must play a role in preserving community standards, and may use the threat of penal sanctions to ensure compliance with the status quo.

But the Court of Appeals has held that preservation and promotion of the status quo is neither an "important" nor a "legitimate" governmental objective. In People v. Onofre, 51 N.Y.2d 476 (1980), the court struck down a New York penal statute prohibiting consensual sodomy, reasoning that "the community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy." But, the court concluded, it is not an appropriate function of the New York State Penal Law to provide

either a medium for the articulation, or an apparatus for the intended enforcement, of the community's moral or theological views. Members of our society may well view the female breast as a "sex object." The state, however, does not have an "important" or "legitimate" interest in preserving and promoting this objectified view of women; indeed, such "an '"archaic and overbroad" generalization' . . . which is evidently grounded in long-standing stereotypical notions of the differences between the sexes, simply cannot serve as a legitimate rationale for a penal provision that is addressed only to [females]." People v. Liberta, 64 N.Y.2d at 169 (citations omitted). See also Mississippi Univ. for Women v. Hogan, 458 U.S. at 725.

The state's suggestion that section 245.01's gender-based classification might prevent the possibility of indecent conduct is clearly inadequate to sustain the statute against attack under the equal protection clause. For the state must present an "exceedingly persuasive" demonstration that the gender-based classification substantially furthers the government's interest in preventing lewd and indecent conduct. People v. Liberta, 64 N.Y.2d at 168-70. The New York courts have consistently and repeatedly held that nudity, in and of itself, is neither lewd nor indecent. See, e.g., Matter of Excelsior Pictures v. Regents of the University of New York, 3 N.Y.2d 237, 242 (1957); People v. Burke, 267 N.Y. 571 (1935). Thus, it is difficult to see how the mere requirement that women cover their breasts in public places is related to the prevention of lewd and indecent

conduct. Even were the court to find that prohibiting exposure of the female breast substantially furthers the government's interest in preventing indecent conduct, the state would be required to show that a gender-neutral statute, i.e. a statute which requires both men and women to cover their breasts in public places, would be a less effective means of advancing the government's asserted interest. A gender-neutral statute would undoubtedly give the state broader authority to control indecent conduct by men; the equal protection clause requires the state to adopt such a statute rather than restricting the liberties of women alone.

The state's asserted interest in preventing public disturbance and inconvenience is similarly insufficient to sustain section 245.01's gender-discriminatory provisions. The defendants are willing to assume, for purposes of argument, that the state has an interest in protecting the privacy of citizens who might be offended or embarrassed by unwelcome exposure to the female breast in public places. But this interest is de minimus at most, since hypersensitive individuals are always free to avoid continued offense or embarrassment simply by averting their eyes. See the discussion at p 23-25, infra; Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975); Cohen v. California, 403 U.S. 15, 21 (1971). The state must demonstrate that section 245.01's gender-based classification substantially furthers an "important governmental objective." Mississippi Univ. for Women v. Hogan, 458 U.S. at 724-25; People v.

Liberta, 64 N.Y.2d at 168-69. The asserted interest in protecting the privacy of those citizens who might be offended is insufficient to meet the state's burden under the equal protection clause.

Even if the governmental objective was considered "important" from a constitutional perspective, however, the state would need to demonstrate that a gender-neutral statute would be a less effective means of protecting citizens from offense or embarrassment in public places. Section 245.01 of the Penal Law constitutes a dress code backed by the threat of criminal sanctions; the statute sets minimum standards regarding the appropriate amount and type of clothing to be worn by men and women in public places within the State of New York. Operating on the theory that some citizens might be offended by the sight of the female breast in public places, the state has mandated that women cover their breasts in any and all public places. Men, on the other hand, are permitted to choose when and where they will appear topfree. No matter how inappropriate it might be for a man to appear topfree in a particular place, and no matter how many individuals might be offended or embarrassed by the sight of a shirtless man in such circumstances, the state-imposed dress code is silent on this subject. A man is permitted under the law to walk topfree through the streets of Rochester's commercial district, as well as through the corridors of the Hall of Justice, without risking the imposition of penal sanctions; yet far more men and women might be offended by such an inappropriate

display of the topfree male body than by the sight of a topfree female in a remote part of Cobbs Hill Park. The equal protection clause requires more; the state may not choose to impose special restrictions on the conduct of women where a gender-neutral statute would better serve the state's asserted objective. Equal protection of the laws demands that if the state chooses to pursue the goal of protecting its citizens from exposure to potentially offensive visual stimuli, it must do so in a gender-neutral manner.

The state has failed to present an "exceedingly persuasive justification" for section 245.01 of the Penal Law. Indeed, the state has failed to demonstrate that the statute's gender-based classification is substantially related to the achievement of an important, legitimate, non-hypothetical governmental objective. At common law, women were considered chattel, their bodies subject to the exclusive domain and control of their fathers and husbands. See, e.g., People v. Liberta, 64 N.Y.2d at 168. The courts of New York State have abandoned this pernicious doctrine, but the legislature seems more reluctant to remove its vestiges from the criminal law. The court should find that section 245.01 violates the defendants' right to equal protection of the laws under the fourteenth amendment to the United States Constitution and Article I, Section 6 of the New York State Constitution.

II.
SECTION 245.01 OF THE PENAL LAW VIOLATES DEFENDANTS' RIGHT TO FREEDOM OF SPEECH AND EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A.
Defendants Were Engaged In Expressive Conduct Within The Scope Of The First Amendment's Protections.

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." This provision has been incorporated by the due process clause of the fourteenth amendment, and restricts the actions of state as well as federal officials. See, e.g., Gitlow v. New York, 268 U.S. 652, 666 (1925). The first amendment protects the free expression of opinions, beliefs and ideas. It was designed to facilitate "the widest possible dissemination of information from diverse and antagonistic sources," Associated Press v. United States, 326 U.S. 1, 20 (1945), and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). See also Buckley v. Valeo, 424 U.S. 1, 49 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring).

The protection afforded by the first amendment is not limited to written or verbal communication. In a long line of decisions, the Supreme Court has repeatedly held that the first amendment applies to the expression of ideas through action, appearance and conduct, as well as to written and verbal forms of expression.

For example, in Tinker v. Des Moines School District, 393 U.S. 503 (1969), the Court held that the first amendment protects the right of students to wear black armbands as a protest against United States involvement in the Vietnam War. In Stromberg v. California, 283 U.S. 359 (1931), the Court upheld the right of individuals to publicly display red flags as a gesture of support for communism. And in Brown v. Louisiana, 383 U.S. 131 (1966), the Court held that a sit-in by black students in a racially restricted library comes within the first amendment's scope.

In determining whether conduct is sufficiently expressive to qualify for first amendment protection, an analysis of the context in which the conduct takes place is of paramount importance. The leading case on this point is Spence v. Washington, 418 U.S. 405 (1974), where the Court held that the act of displaying a United States flag with a peace symbol attached to it was conduct protected by the first amendment. The defendant had displayed his flag as a protest against then-recent actions of the United States military in Cambodia and at Kent State University. In holding that the defendant's conduct was sufficiently imbued with elements of communication to fall within the scope of the first amendment, the Court looked to two factors: first, whether there was an "intent to convey a particularized message," and second, whether "the likelihood was great that the message would be understood by those who viewed it." 418 U.S. at 410-11. See also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984); id. at 304-05

(Marshall, J., dissenting). The Court held that the defendant clearly intended to make a statement concerning the domestic and foreign affairs of his government, and that "it would have been difficult for the great majority of citizens to miss the drift of [the defendant's] point at the time that he made it." Spence, 405 U.S. at 410.

The Spence analysis applies with equal, if not greater, force to the actions of the defendants in this case. For the defendants here clearly intended to convey a particularized message through their conduct. Their primary purpose in taking their shirts off in Cobbs Hill Park was to impress upon the public consciousness, in as dramatic a way as possible, the fact that women's breasts are not sex objects, and to challenge the repressive, puritanical and sexist attitudes which gave rise to section 245.01 of the Penal Law. Through their act of civil disobedience, the defendants wished to point out the hypocrisy of state laws which permit men to go topfree in public places while threatening women with criminal sanctions for exercising a similar freedom. The defendants' choice of location for their protest was tailored to communicate this message, as Cobbs Hill Park is a recreational area where men regularly appear topfree.

There can be no doubt that the political and ideological significance of defendants' actions was likely to be understood by those who viewed them. The defendants' conduct in removing their shirts in Cobbs Hill Park was accompanied by extensive speech lying at the core of the first amendment's protections.

The defendants communicated their message not merely by exposing their breasts, but also by discussing their views with supporters and other individuals who had assembled to witness the rally, by displaying signs and wearing tee-shirts expressing their views, by issuing a press release in which they explicitly stated the meaning of the protest, and by discussing their views with members of the press both before and after the demonstration. The news media certainly understood the ideological significance of defendants' actions; reporters from newspapers, radio stations, and television stations from across the Nation provided extensive coverage to the defendants' demonstration. Since the defendants clearly intended to communicate a particularized message through their conduct, and the likelihood was great that the message would be understood by those who viewed their actions, defendants' conduct was sufficiently expressive to come within the first amendment's protection of freedom of speech.

The facts of this case are readily distinguishable from those of earlier cases in which courts have declined to accord public exposure of the human body first amendment protection. See, e.g., South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984); Chapin v. Town of Southampton, 457 F. Supp. 1170 (E.D.N.Y. 1978); People v. Hollman, ___ A.D.2d ___ (1985). For none of the reported cases have arisen in the context of a protest, demonstration or rally involving verbal and written forms of expression as well as expressive nudity. South Florida Free Beaches and Chapin were both actions for declaratory and

injunctive relief in which plaintiffs sought the right to sunbathe in the nude. Hollman similarly involved a prosecution for nude sunbathing in violation of section 245.01 of New York's Penal Law. In none of these cases did the parties demonstrate a clear "intent to convey a particularized message" as the defendants did here; nor did these cases involve a substantial likelihood "that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. at 410-11. Indeed, in each of the three cases above, the courts pointed out the key distinguishing characteristic of the present case, stating that nudity is protected as speech when it is combined with some mode of expression which itself is entitled to first amendment protection. South Florida Free Beaches, 734 F.2d at 610; Chapin, 457 F. Supp. at 1174; Hollman, ___ A.D.2d at ___.

The fact that expressive conduct involves exposure of the human body does not divest that conduct of first amendment protection, for nudity in and of itself may not be equated with obscenity. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975); Jenkins v. Georgia, 418 U.S. 153, 161 (1974); Miller v. California, 413 U.S. 15 (1973). The state may, of course, directly proscribe nudity which is intentionally or effectively "lewd." New York State has, in fact, done just this in section 245.00 of the Penal Law, which provides that:

> A person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises,

and with intent that he be so observed.

But the New York courts have repeatedly held that nudity, in and of itself, is not obscene, and is not punishable under the state's public lewdness statutes. See, e.g., Matter of Excelsior Pictures v. Regents of the University of New York, 3 N.Y.2d 237, 242 (1957); People v. Burke, 267 N.Y. 571 (1935); People v. Hardy, 77 Misc. 2d 1092 (App. Term, 2d Dept. 1974); People v. Gilbert, 72 Misc. 75 (Kings Co. Crim. Ct. 1972). The sight of a woman's breasts may be unappealing and unattractive to some people; it may be repulsive and vulgar to others. Nevertheless, expressive conduct involving nudity retains its first amendment protection in the abscence of conduct making the public exposure lewd or obscene.

B.
The Governmental Interests Allegedly Served By Section 245.01 Are Insufficient To Justify Its Substantial Limitation Of First Amendment Freedoms.

Defendants acknowledge the fact that the first amendment inquiry in this case is not completed merely by a showing that they were engaged in expressive conduct within the scope of the first amendment's protections. The Supreme Court has held that where "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently compelling governmental interest in regulating the nonspeech elements may justify incidental limitations on first amendment freedoms. U.S. v. O'Brien, 391 U.S. 367, 376 (1968). But such limitations are

constitutionally permissible only where the regulation furthers an important or substantial governmental interest, where that interest is unrelated to the suppression of free expression, and where the incidental restriction on first amendment freedoms is no greater than is essential to furtherance of the governmental interest. Id. at 377. All three of these criteria must be satisfied for a statute restricting expressive conduct to pass constitutional muster; section 245.01 of the New York State Penal Law falls far short on all counts.

Three governmental interests are usually asserted on behalf of statutes which proscribe public nudity in and of itself, rather than nudity which is intentionally or effectively lewd: first, the state's interest in protecting its citizens from unwelcome exposure to nudity in public places; second, the state's interest in shielding its children from the allegedly unhealthy influence of exposure to nudity; and third, the state's interest in protecting those who might wish to appear in public unclothed from harassment, physical violence and sexual attack. Each of these asserted interests will be examined in turn and shown to fail the strict requirements of the three-part O'Brien test described above.

1. Protecting Citizens from Unwelcome Exposure to Nudity in Public Places. The principal argument advanced in support of section 245.01 is that it protects citizens who might be offended or embarrassed by the sight of public nudity. But Supreme Court decisions demonstrate that such an interest is neither

"important" nor "substantial." In Cohen v. California, 403 U.S. 15 (1971), the Court overturned a criminal conviction based on the defendant's public display of a jacket bearing the epigraph "Fuck the Draft" on the back. The defendant was walking through a Los Angeles courthouse at the time of his arrest. In rejecting the state's argument that prosecution was justified to prevent a distasteful mode of expression from being thrust upon unwilling or unsuspecting viewers, the Court stated:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Id. at 21. In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the Court invalidated a Jacksonville, Florida ordinance which prohibited drive-in movie theaters with screens visible from public streets and places from showing movies containing nudity. Following the Court's analysis in Cohen, Justice Powell wrote:

> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

Id. at 210-11 (citations omitted).

The state may well have an interest in protecting the privacy of citizens who might be offended by unwelcome exposure to the nude human form in public places. But this interest is de minimus at most, since hypersensitive individuals are always free to avoid continued offense simply by looking the other way. As the Court stated in Cohen, 403 U.S. at 15-16:

> [P]ersons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home.

New York State's interest in protecting citizens from exposure to nudity in public parks, on public streets, and in other public places where they are in no sense captive is de minimus; this interest cannot be considered "important" or "substantial" as required by U.S. v. O'Brien, 391 U.S. 367, 376 (1968).

Even if the state's interest in shielding citizens from unwelcome exposure to public nudity were considered important, the statute would still fail to satisfy the second prong of the O'Brien test, which requires that the governmental interest served by a statute be unrelated to the suppression of free speech. Content-neutral justifications for regulating nudity might include promoting the public health by reducing the incidence of skin cancer, or promoting traffic safety by ensuring

that drivers keep their eyes on the road.[1] But the state's interest in protecting its citizens from exposure to potentially offensive visual stimuli is quite different from its interest in promoting public health and safety. Here the state's interest is directly related to the perceived offensiveness of an expressive activity. The nude human form is not offensive in and of itself; rather, it is the symbolic challenge that public exposure of the female breast poses to puritanical and sexist ideologies which causes some members of our society to be offended. As the state's interest is not completely unrelated to the suppression of free expression, section 245.01 fails to satisfy the second prong of the O'Brien test. 391 U.S. at 376.

Nor does the statute satisfy the third prong of the O'Brien test, which requires that any incidental restriction of first amendment freedoms be no greater than is essential to furtherance of the governmental interest. Section 245.01 of the Penal Law prohibits nudity in all public places and at all times. The establishment of separate clothing-optional parks and beaches would certainly serve the state's interest in protecting the

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1. Of course, neither of these interests would be sufficient to justify section 245.01's broad regulation of public nudity. The first interest is insufficient on equal protection grounds, in that men as well as women fall victim to skin cancer. The second is insufficient because the statute sweeps far too broadly, prohibiting nudity in all public places and not just on or near public thoroughfares. Moreover, it would be ludicrous to suggest that either of these interests was actually considered by the state legislature in passing section 245.01; they can not, therefore, be used to justify the statute's infringement of first amendment freedoms. See, e.g., CLR Corp. v. Henline, 520 F. Supp. 760 (W.D. Mich. 1981), aff'd, 702 F.2d 637 (6th Cir. 1983).

privacy of citizens who might be offended or embarrassed equally as well as section 245.01, with far less intrusion upon essential first amendment freedoms. Individuals who are offended by public nudity would thereby be put on notice concerning parks, beaches and other recreational areas they might wish to avoid. The defendants and other individuals who might wish to appear topfree or nude as part of expressive activity protected by the first amendment would have access to public lands for this purpose.

2. Shielding Children from Unhealthy Exposure to Nudity. A second argument which might be advanced in support of section 245.01 of the Penal Law is that it protects children from the allegedly unhealthy influence of nudity. But the Supreme Court has foreclosed any suggestion that this interest is "important" or "substantial." While a state can clearly place more stringent controls on communicative materials available to youth than on those available to adults, Ginsberg v. New York, 390 U.S. 629 (1968), minors are entitled to a significant measure of first amendment protection, Tinker v. Des Moines School District, 393 U.S. 503 (1969), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. See, e.g., Rabeck v. New York, 391 U.S. 462 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968). Thus, the Court held in Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-14 (1975), that an ordinance prohibiting drive-in movie theaters from showing films containing nudity could not be justified as a measure designed to protect

children. The Court emphasized the fact that all nudity cannot be deemed obscene, even as to minors; to be obscene, the Court held, expression must be in some significant way erotic. 422 U.S. at 213 & n. 10. The state's interest in shielding children from exposure to nudity which is not obscene is minimal at most.

Like the state's interest in protecting adults from exposure to nudity which they might find offensive, the state's interest in shielding children from the allegedly unhealthy effects of seeing public nudity is not unrelated to the suppression of free speech. For nudity is not a dangerous substance like tobacco or alcohol which is kept from children because of its harmful proclivities; rather, the state's interest is in limiting the access children have to information concerning alternative lifestyles, values and ideologies.

This justification also fails to satisfy the requirement that incidental restrictions on first amendment freedoms be no greater than is essential to furtherance of the governmental interest. The state's interest in protecting children from images that the legislature considers unsuitable could be served equally well by designating certain parks and beaches as clothing-optional recreational areas and placing such areas off limits to persons below the age of majority. Children would thereby be protected from allegedly harmful exposure to nudity, while the defendants and others similarly situated would have access to public lands to engage in expressive conduct protected by the first amendment.

3. Protecting Those Who Might Wish to Appear Unclothed from Harassment, Physical Violence and Sexual Attack. A third argument which might be presented on behalf of section 245.01 is that it protects those who might wish to appear nude in public from harassment, physical violence, and sexual attack. However, the mere speculation that public nudity might incite violence can not be considered an "important" or "substantial" governmental interest. A mere apprehension of difficulties does not overcome the right to free expression. See, e.g., United States v. Grace, 461 U.S. 171, 182 (1983); Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969). Indeed, Supreme Court cases have long held that the potentially hostile reaction of listeners is an insufficient justification for curtailing free speech. As the Court observed in Cohen v. California, 403 U.S. 15, 23 (1971):

> We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

See also Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Tinker v. Des Moines School District, 393 U.S. 503 (1969); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); Collin v.

Smith, 447 F. Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

The state's interest in protecting those who might wish to appear in public without clothes from harm also fails to satisfy the third prong of the O'Brien test, as alternatives are available which would be far less restrictive of first amendment freedoms. The normal and appropriate method of protecting citizens from physical assault is through the provision of police protection and enforcement of the criminal law. Establishment of clothing-optional parks and beaches would enable the police to focus their limited resources, while permitting substantially more expressive nudity than is allowed under section 245.01's sweeping prohibition.

None of the possible justifications for section 245.01 is sufficient to satisfy the strict requirements of the three-part test laid down in United States v. O'Brien, 391 U.S. 367, 376 (1968). Nor can the statute be upheld as a reasonable time, place or manner restriction on freedom of speech. The Supreme Court has held that such restrictions are permissible only where they are justified without reference to the content of the regulated speech, where they are narrowly tailored to serve a significant governmental interest, and where they leave open ample alternative channels for communication of the information. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); Heffron v. Int'l Society for Krishna Consciousness, 452

U.S. 640, 647-48 (1981). The Court has acknowledged that this standard is little, if any, different from the O'Brien test discussed above. See Clark v. Community for Creative Non-Violence, 468 U.S. at 298 & n. 8; id. at 308 & n. 6 (Marshall, J., dissenting). No significant governmental interest can be found to justify section 245.01's broad restriction of first amendment freedoms; the governmental interests asserted on the statute's behalf are not content-neutral; and the statute is not narrowly tailored, as less restrictive alternatives are clearly available. For the same reasons that section 245.01 fails to satisfy the requirements of the O'Brien test, it cannot be upheld as a reasonable time, place or manner restriction of free expression.

C.
Section 245.01 Is Void For Overbreadth In
Violation Of The First And Fourteenth Amendments.

A criminal statute is overbroad in violation of the first and fourteenth amendments to the United States Constitution when its terms are so far-reaching as to proscribe constitutionally protected conduct. See, e.g., Zwickler v. Koota, 389 U.S. 241, 249-50 (1967). If a statute or ordinance, read in its ordinary meaning, could be employed to punish protected behavior, it must be struck down even though the person against whom it is being enforced was not engaged in such protected conduct. See, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922, 933 (1975), where the Court wrote: "We have previously held that even though a statute

or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court." See also Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). The very existence of an overbroad statute has a chilling effect on the exercise of constitutionally protected rights. Thus, in determining issues of overbreadth, the court need not determine whether the defendants' activities are constitutionally protected. See Bigelow v. Virginia, 421 U.S. 809 (1975).

Section 245.01 of the Penal Law is unconstitutionally overbroad in that its very existence has an inhibiting effect on freedom of speech and expression at the core of the first amendment. Doran v. Salem Inn, Inc., 422 U.S. 922, 933 (1975); Collin v. Smith, 447 F. Supp. 676, 692 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). The defendants have standing to challenge the statute on their own behalf, and to make overbreadth arguments on behalf of individuals not currently before the Court.

Section 245.01 prohibits a woman from exposing her breasts in any public place. Within the almost unlimited scope of this statute, the only exceptions to the proscription of public exposure are in the contexts of live entertainment and breast feeding of infants. But the first amendment does not begin and end with protection of live entertainment. The statute

eviscerates traditionally protected areas of first amendment activity including political speech, education, scientific research, and artistic creation.

Human nudity is an extraordinarily viable means for emphasizing statements of political protest. It is dramatic, compelling, and ensures attention from the news media, promoting broad dissemination of the message sought to be communicated. Moreover, exposure of the human body often plays a powerful substantive role in political speech. In 1969, a group of Grinnell College students disrobed completely at a speech given by a representative of Playboy Magazine to protest the magazine's exploitation of female nudity for commercial gain. In 1977, a number of women in Berkley, California marched topfree in a May Day Equal Rights Parade. In July, 1983, naturists in the New York City area held a nude demonstration at Jacob Riis Park to protest legislative repression of clothing-optional lifestyles.[2] On May 30, 1985, in Oshkosh, Wisconsin, four women took off their clothes during a speech by President Reagan to emphasize political statements being displayed on signs: "Naked Not Nuked," "Reagan Must Face the Naked Truth," and "Our Emperor Has No Clothes." New York Post, May 31, 1985, at 13. And on June 21, 1986, the defendants in this case removed their shirts in Cobbs Hill Park to challenge the repressive, puritanical and sexist

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2. The demonstrators were arrested under 18 U.S.C. Section 13, assimilating section 245.01 of New York's Penal Law, but all charges were dropped when the United States Attorney for the Eastern District of New York refused to prosecute.

attitudes which gave rise to section 245.01 of the Penal Law. Nudity in all of the above examples was central to political speech; section 245.01 prohibits all of these dramatic political protests, as they do not fall within the live entertainment exception.

The framers of this piece of legislation also did not see fit to exempt exposure of the human body for educational and scientific purposes from the sweeping statutory proscription. Section 245.01 sweeps within its ambit the exposure of private or intimate parts of the human body in the context of anatomy and biology classes, social science seminars, human sexuality courses, consciousness raising and therapy groups, cancer detection demonstrations and lectures on reconstructive plastic surgery. Medical, psycho-social and psycho-sexual research that involves human nudity is also severely restricted. In short, the statute makes a shambles of academic and scientific freedom.

Section 245.01 also threatens artistic expression by excluding nudity from its creation. Models, actors and actresses have no immunity from prosecution under the statute while the art form is in creation. Artistic expression in the State of New York is thus undoubtedly chilled by the statute's restrictions on filming, photographing, painting, and sculpting nude subjects.

The statute is void for overbreadth in violation of the first and fourteenth amendments in that it has a chilling effect on constitutionally protected political, educational, scientific,

and artistic expression.

D.
Section 245.01 Compels Defendants To Promote Viewpoints With Which They Disagree In Violation Of The First And Fourteenth Amendments.

The right of freedom of thought protected by the first amendment includes both the right to speak freely and the right to refrain from speaking at all. See Wooley v. Maynard, 430 U.S. 705, 714 (1977); Board of Education v. Barnette, 319 U.S. 624, 633-34 (1943); id. at 645 (Murphy, J., concurring). The Constitution not only guarantees the individual's right to promote unorthodox ideological, political and religious viewpoints, unfettered by governmental interference, but also protects the individual's right to refuse to foster viewpoints which she considers morally, politically or ideologically repugnant. Wooley v. Maynard, 430 U.S. at 714.

In Board of Education v. Barnette, 319 U.S. 624 (1943), the Supreme Court struck down a West Virginia statute requiring public school students to salute the United States flag, holding that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority. . . ." 319 U.S. at 636. Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), the Court invalidated a New Hampshire statute prohibiting individuals from expunging the state motto, "Live Free or Die," from their automobile license plates. Chief Justice Burger, writing for the Court, concluded

that:

> Here, as in Barnette, we are faced with a state measure which forces an individual, as part of his daily life -- indeed constantly while his automobile is in public view -- to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

430 U.S. at 715 (quoting Barnette, 319 U.S. at 642).

Members of our society have frequently attempted to communicate political, ideological and religious views through their choice of specific items of clothing. See, e.g., Cohen v. California, 403 U.S. 15 (1971) (jacket with "Fuck the Draft" insignia); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (black armbands); Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (Nazi uniforms). Others have chosen their clothing not only for the purpose of expressing particular ideas or concepts, but also to avoid communicating messages which they believe are implicit in certain fashions. For example, members of the Quaker faith traditionally refrained from wearing colorful and expensive clothing because of their belief that contemporary fashions expressed a preoccupation with man rather than reverence towards God. See, e.g., Bacon, M.H., The Quiet Rebels: The Story of the Quakers in America, at 45-46 (New Society Publishers 1985). See also Hostetler, J., Amish Society, at 234-38 (Johns Hopkins Univ. Press, 3d Ed. 1980).

Just as specific articles of clothing have communicative content in our society, the wearing of clothing -- in and of itself -- expresses moral, religious and ideological viewpoints in certain contexts. Defendants contend that by requiring individuals to wear clothing in situations where the sole function served by clothing is concealment of the human body, section 245.01 of the Penal Law compels them to communicate values and ideologies which they actively oppose. Defendants further contend that by requiring women to conceal their breasts in contexts where men regularly and unabashedly appear topfree, section 245.01 of the Penal Law compels them to promote and foster sexist myths, values and ideologies which they consider philosophically and morally repugnant.

Defendants are naturists and feminists. As naturists, defendants believe that the human body is a wholesome physical entity which is neither inherently obscene nor likely to cause erotic stimulation in typical social contexts. As feminists, defendants resent and reject the view that their breasts are sex objects. They conscientiously believe that there is a clear relationship between the sexual objectification of women and the relegation of women to subordinate roles in our male-defined society. The defendants further believe that our society's predominate sexist ideology promotes and condones acts of physical and sexual violence perpetrated against women. Section 245.01 of the Penal Law compels defendants to promote repressive and puritanical views concerning the human body which run

directly contrary to their naturist ideology; section 245.01 similarly requires defendants to foster dangerous sexist views concerning the human body which run counter to their feminist ideology.

The infringement of defendants' rights in this case is far more pervasive than that in either Barnette or Wooley. The statute in Barnette required students to salute the flag for at most several seconds each school day. Here, defendants' right of access to any and all public areas -- 24 hours a day, 365 days each year -- is conditioned upon their willingness to promote viewpoints which they find noxious. The statute in Wooley merely required drivers to display the state motto on their automobile license plates. Here, defendants are compelled to communicate ideologies which they consider offensive not by attaching a message to an object, but by bearing the message directly on their bodies.

Section 245.01 of the Penal Law compels defendants to promote viewpoints which they consider morally, politically and ideologically repugnant; it violates their right to refrain from speaking under the first and fourteenth amendments to the United States Constitution.

III.
SECTION 245.01 OF THE PENAL LAW VIOLATES DEFENDANTS' RIGHT TO FREEDOM OF SPEECH AND EXPRESSION UNDER ARTICLE I, SECTION 8 OF THE NEW YORK STATE CONSTITUTION

Article I, Section 8 of the New York State Constitution provides that: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The New York State Court of Appeals has recognized that, "at the very least, the guarantee of freedom of expression set forth in our State Constitution is of no lesser vitality than that set forth in the Federal Constitution." Bellanca v. New York State Liquor Authority, 54 N.Y.2d 228, 235 (1981), cert. denied, 456 U.S. 1006 (1982). Moreover, the Court of Appeals has acknowledged the special role that free speech and exchange of ideas play in the democratic process of our state, and has suggested that the free speech provisions of our constitution may, in fact, provide even broader protections than are provided under the first amendment. See, e.g., Matter of Beach v. Shanley, 62 N.Y.2d 241, 255 (1984) (Wachtler, J., concurring); People v. Ferber, 57 N.Y.2d 256, 259 (1982). See also SHAD Alliance v. Smith Haven Mall, 106 A.D.2d 189 (2d Dept.), rev'd on other grounds, 66 N.Y.2d 496 (1985).

If the court finds that section 245.01 of the Penal Law violates the first and fourteenth amendments to the United States Constitution, it should also find the statute violative of the New York State Constitution's free speech guarantee. Bellanca

v. New York State Liquor Authority, 54 N.Y.2d at 235. If, however, the court should find that the defendants' conduct is not protected under the federal constitution, it should nevertheless hold that the present prosecution is barred under Article I, Section 8 of the state constitution. The defendants engaged in nonviolent, political expression lying at the heart of our state constitution's free speech provision. Article I, Section 8 would accord a hollow shell of protection to political expression if it shielded the commercial exploitation of women by men from state regulation while providing no protection to the defendants' poignant efforts to liberate women from sexist and repressive perceptions of the female body.

IV.
SECTION 245.01 IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE DUE PROCESS CLAUSE OF ARTICLE I, SECTION 6 OF THE NEW YORK STATE CONSTITUTION

The defendants contend that section 245.01 of the Penal Law is void for vagueness in violation of the defendants' right to due process of law and freedom of expression under the fourteenth amendment to the United States Constitution and Article I, Section 6 of the New York State Constitution. As generally stated, the "void for vagueness" doctrine requires that a penal statute define a criminal offense with sufficient precision that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement. See Kolender v. Lawson, 461 U.S. 352, 357 (1983); Smith v. Goguen, 415 U.S. 566, 572-76 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

The void for vagueness doctrine promotes interests central to the concept of due process of law. As the Court stated in Grayned v. City of Rockford, 408 U.S. 104, 108-08 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy

> matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

(Citations omitted.)

The void for vagueness doctrine demands that citizens be given adequate warning of what the criminal law demands before they can be compelled to conform their conduct to the dictates of the law. See, e.g., People v. New York Trap Rock Corp., 57 N.Y.2d 371, 378 (1982); People v. Illardo, 48 N.Y.2d 408, 413 (1979); People v. Firth, 3 N.Y.2d 472, 474 (1957). The New York Court of Appeals has repeatedly held that criminal sanctions may not be imposed unless the statute defining an offense gives persons of ordinary intelligence fair notice that their contemplated conduct is forbidden. See, e.g., Sussman v. New York State Organized Crime Task Force, 39 N.Y.2d 227, 234 (1976); People v. Breck, 32 N.Y.2d 567 (1973). "[N]othing less than 'adequate warning of what the law requires' will do." People v. New York Trap Rock Corp., 57 N.Y.2d at 378; People v. Cruz, 48 N.Y.2d 419, 424 (1979).

The court has further held that the void for vagueness doctrine prohibits the imposition of penal sanctions where the legislature has failed to provide "boundaries sufficiently distinct" for police, judges and juries to fairly administer the law. People v. New York Trap Rock Corp., 57 N.Y.2d at 378; People v. Cruz,

48 N.Y.2d at 424. "As common sense and experience both tell us, unless by its terms a law is clear and positive, it leaves virtually unfettered discretion in the hands of law enforcement officials." People v. Illardo, 48 N.Y.2d at 408.

A penal statute is subject to particularly strict review under the void for vagueness doctrine when its terms are capable of being applied to speech or expressive conduct protected by the first amendment. For vague statutes may have a chilling effect on constitutionally protected forms of expression. The Supreme Court has held that "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974). See also Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); Smith v. California, 361 U.S. 147, 151 (1959). As with the closely related constitutional doctrine of overbreadth, discussed supra at p 31-32, the Supreme Court has held that defendants may mount a facial challenge to the validity of a vague law which reaches a "substantial amount of constitutionally protected conduct" -- even though the statute may only be impermissibly vague as applied to the conduct of third parties not before the court. Kolender v. Lawson, 461 U.S. 352, 358-59 & n. 8.

Section 245.01 of the Penal Law is void for vagueness under the constitutional standards discussed above. The statute provides that "[a] person is guilty of exposure if he appears in a public

place in such a manner that the private or intimate parts of his body are unclothed or exposed." What does the statute mean by the term "public place?" The term is not defined in section 245.01 and has a potentially unlimited scope. Would a woman be guilty of exposure if she removed her shirt while visible from publicly owned lands, even though on privately owned premises herself? What if she removes her shirt while visible from other privately owned premises? Are women free to remove their shirts while on privately owned premises which are nevertheless regularly open to the general public, such as the campus of the University of Rochester?

What does the statute mean by the term "unclothed or exposed?" Would a woman lying face down on the grass with her bikini top unstrapped be subject to prosecution, for even though she might be considered "unclothed," her breasts clearly are not "exposed?" What about a woman whose breasts are completely covered by a wet tee-shirt? Her breasts may well be "exposed" to public view, but they most certainly are not "unclothed."

Section 245.01 defines the "private or intimate parts of a female" to include "that portion of the breast which is below the top of the areola." Does this mean that a woman is subject to prosecution if any part of her breasts below the top of the areola is exposed, or must the areola itself be exposed for there to be a violation of the statute? How old must a female be to trigger section 245.01's sanctions? Does section 245.01 of the Penal Law proscribe all exposure of the female breast in public

places, or merely exposure which is lewd or indecent? Does the statute have an implied requirement of "intent," or is exposure of the person a strict liability offense?

What does section 245.01 mean by the phrase "entertaining or performing in a play, exhibition, show or entertainment?" Do non-commercial, unofficial performances and productions come within this statutory exemption? Do educational, political, medical, scientific, and artistic endeavors fall within the entertainment exception? How are individuals to discover the answers to these questions without risking prosecution?

The language used by the legislature in section 245.01 of the Penal Law is too imprecise to meet the strict requirements of due process of law. The statute fails to define essential terms with sufficient precision to give citizens "adequate warning of what the law requires." People v. New York Trap Rock Corp., 57 N.Y.2d 371, 378 (1982). Nor do the statutory terms provide "boundaries sufficiently distinct" to prevent arbitrary and discriminatory enforcement by public officials. Id. at 378. Given that section 245.01's imprecise language has a significant chilling effect on free expression, the statute must be subjected to the strictest form of scrutiny under the due process clause. Smith v. Goguen, 415 U.S. 566, 573 (1974). The statute cannot survive such scrutiny; accordingly, it should be declared void for vagueness under the due process guarantees of the federal and state constitutions.

V.
SECTION 245.01 OF THE PENAL LAW VIOLATES DEFENDANTS' FUNDAMENTAL RIGHTS UNDER THE NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The defendants contend that section 245.01 of the Penal Law is invalid and unconstitutional in that it denies them fundamental rights and liberties guaranteed by the ninth amendment to the United States Constitution. The ninth amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People." In his concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Goldberg noted that:

> While this Court has had little occasion to interpret the Ninth Amendment, "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect." [I]n interpreting the Constitution, "real effect should be given to all the words it uses." [T]he Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.

The Supreme Court has established beyond a doubt that the scope of constitutional protection for individual liberty is not limited to those fundamental liberties which are specifically enumerated in the Bill of Rights. Protection is afforded to non-enumerated, "penumbral" rights as well, such as the right to privacy, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965), the right to travel, Kent v. Dulles, 357 U.S. 116 (1958), and the right to control the rearing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923).

The liberty to regulate and control one's own appearance is

another "penumbral" right protected by the Constitution. The framers of the Constitution certainly presumed that this right would be held inviolate. In the course of congressional debate concerning which guarantees should be explicitly enumerated in the Bill of Rights, Congressman Sedgewick of Massachusetts commented:

> If the committee were governed by that general principle . . . they might have declared that a man should have a right to wear his hat if he pleased . . . but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed.

Cited in Kelley v. Johnson, 425 U.S. 238, 251-52 (1976) (Marshall, J., dissenting).

The courts have repeatedly recognized that the constitution protects the right of individuals to determine their own appearance and lifestyle -- the right to wear or not wear a hat as one pleases. For example, in Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973), the United States Court of Appeals for the Second Circuit held that a right to control one's own appearance exists under the fourteenth amendment, stating that: "Personal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference. Limitation of such a right requires some showing of public need." The Court of Appeals for the First Circuit reached a similar conclusion in Richards v. Thurston, 424 F.2d 1281, 1284-84 (1st Cir. 1970), where it stated that "liberty

seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the abilities of others to enjoy their liberty." See also Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

The New York State Court of Appeals has implicitly recognized the right of individuals to control their own person appearance, and has extended that right to appearance involving exposure of private or intimate parts. The court, in reversing a conviction for exposure of a female under former section 245.01 of the Penal Law, stated unequivocally that: "Certainly, legislation may not control the manner of dress absent commercial exploitation of exposure, or absent conduct or dress under circumstances creating or likely to create public disorder." People v. Price, 33 N.Y.2d 831, 832 (1973). The exposure with which the defendants are charged in this case certainly did not involve commercial exploitation, nor did it involve circumstances creating or likely to create public disorder.

The choice of a woman to appear topfree in public places, in the absence of commercial exploitation or public disorder, is thus a recognized aspect of the right of members of the citizenry at large to control their own personal appearance. Intrusions by the state upon this constitutionally protected right must be

justified by an affirmative showing of public need which outweighs the restraint of personal liberty. Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970). Section 245.01's total ban on exposure of the female breast in public places cannot pass constitutional muster under the heightened standard of review required here.

Section 245.01 of the Penal Law threatens women with criminal sanctions if they choose to appear topfree in a public place, quite clearly and without exception infringing on their right to determine their own appearance and lifestyle. Certainly, the mere innocent, indeed passive, non-threatening exercise of women appearing topfree in public, as do men, cannot justify the imposition of penal sanctions. The police power is derived from the legislature's duty to secure and protect the public health, safety and welfare; the legislature may not attempt to control customs, traditions, ideas, beliefs and opinions, or to fix societal "norms," through the penal law. See People v. Onofre, 51 N.Y.2d 476 (1980), and the discussion at p 12-13, supra.

Our pluralistic society is built on the presumption of individual liberty. Majorities may not legislate their "norms" into law at the expense of individual rights. Where, as here, sensitive and important personal rights are affected, the state must make an affirmative showing that its proposed restraint of personal liberty is compelled by some overriding public need. Because the state has failed to present such an affirmative showing, the court should find that section 245.01 of the Penal

Law is unconstitutional in that it violates the defendants' fundamental rights under the ninth amendment.

CONCLUSION

FOR THE FOREGOING REASONS, THE DEFENDANTS RESPECTFULLY REQUEST THAT THIS COURT GRANT THE REQUESTED RELIEF AND DECLARE THE CHALLENGED STATUTE UNCONSTITUTIONAL.

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Respectfully submitted,

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